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In the

Supreme Court of the United States

John D. Ashcroft, Attorney General of the United States,
Petitioner,

v.

The Free Speech Coalition, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT OF AMICI INTEREST

The States have two related compelling interests in this Court's consideration of the federal ban on "virtual" child pornography: the protection of children and the facilitation of effective law enforcement. These interests, grounded in findings based on "substantial evidence" as to both "the harm to be avoided and the remedial measures adopted," are entitled to deference, outweigh any First Amendment considerations, and require that the ban be upheld. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 197 (1997).

Children are the "most vulnerable and defenseless" members of our society. *Doe v. Poritz*, 662 A.2d 367, 376 (N.J. 1995) (upholding New Jersey's sexual offender registration and community notification statute). Some reports indicate that as many as one in every six Americans has been sexually molested as a child. Kohn, *Shattered Innocence, Child Sexual Abuse is Yielding its Dark Secrets to the Cold Effects of Research*, Psychol. Today, Feb. 1987, at 54. The States, as well as Congress, have a duty to protect those who are least able to protect themselves.

The Internet explosion has challenged Congress' and the States' efforts to protect children from the downstream effects of such readily-available, though illegal, material. Child pornography, an effective tool in child seduction, is widely available on the Internet, which is saturated with such materials. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway*, 83 Geo. L.J. 1849, 1914 (1995). One measure that has been taken by several States, as well as Congress, is to remove from the marketplace an effective tool in child molestation and abuse: realistic-looking (though "virtual") pictures of children engaging in sexually-explicit conduct.

This measure has been taken for two considered reasons. First, it has been shown that pedophiles frequently use such pictures to seduce children. Second, the prohibition of both

actual and computer-generated, virtual child pornography permits law enforcement to prosecute child pornographers effectively. In the absence of a ban, child pornographers could readily evade prosecution by asserting that an actual image of a child is, in reality, a virtual image.

Eleven States currently have statutes that expressly ban computer-generated, virtual child pornography. Ark.Code Ann. § 5-27-605; Del.Code Ann. Title 11 §§ 1103 and 1108; 720 Ill.Comp.Stat. § 5/11-20.1; Iowa House File 327 Seventy-Ninth General Assembly (effective July 1, 2001); Minn.Stat.Ann. § 617.246; Miss.Code Ann. § 97-5-33; Neb.Rev.Stat. § 28-1463.03; Nev.Rev.Stat.Ann. §§ 200.700 and 200.730; N.J.Stat.Ann. § 2C:24-4; N.M.Stat.Ann. §§ 30-6A-2 and 30-6A-3; Va.Code § 18.2-374.1. One State bans computer-generated images that incorporate photographs of children. Kan.Stat.Ann. § 21-3516. Seven States currently have statutes banning pornographic materials that "depict" a child, which can fairly be read to include a computer-generated, virtual image of a child. Ariz.Rev.Stat.Ann. § 13-3553; Ga.Code § 16-12-100; Idaho Code § 18-1507; S.D.Cod.Laws § 22-22-24; Rev.Code Wash.Ann. § 9.68A.060; W.Va.Code § 61-8C-3; Wisc.St.Ann § 948.12. One State has a bill pending in its legislature that would ban computer-generated, virtual child pornography. Fla. Bill No. CS/HB 203. Many other States ban child pornography that portrays an actual child.

These States, in addition to Congress, have come to the measured conclusion that the abolition of both actual and virtual child pornography, depicting children engaging in sexually-explicit activity, is necessary to protect children from unfathomable psychological and physical harm and to facilitate law enforcement. The States would be unable to enforce their bans on child pornography if they were required to establish that the image is actual, not virtual, because the computer technology to create images is so sophisticated that virtual images frequently are indistinguishable to juries, and

even experts, from actual photographs. The faulty reasoning of the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), threatens the validity of these State statutes and would render enforcement of child pornography laws impossible.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2252A, 2256, ("CPPA"), fully accords with First Amendment principles. Congress, after considering extensive testimony and documents, found that there is a link between computer-generated, virtual child pornography, of such quality that it is indistinguishable from a depiction of an actual child, and harm to children. It is the considered judgment of Congress that, in order to protect those members of our society who are the most vulnerable and defenseless, the virtual child pornography tool, that has been shown to be used to seduce children and can thwart effective law enforcement, should be banned, even if it arguably is a protected form of speech.

If explicit child pornography, showing virtual children engaging in sexual acts such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area," is entitled to any protection under the First Amendment, then such protection is quite minimal. The compelling interest of the government in protecting children from harm, which requires that law enforcement be effective, outweighs any interest of society in such expression. This effort by Congress to protect children is based on a substantial foundation and must be accorded the deference it is due. When the predictive judgment of Congress is given due deference, the CPPA fully accords with First Amendment principles and should be upheld.

ARGUMENT

GIVING DEFERENCE TO THE JUDGMENT OF CONGRESS THAT THE BAN ON VIRTUAL PORNOGRAPHIC IMAGES OF CHILDREN WILL PROTECT CHILDREN FROM HARM AND WILL FACILITATE LAW ENFORCEMENT, THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 FULLY ACCORDS WITH FIRST AMENDMENT PRINCIPLES.

The CPPA furthers Congress' interest in protecting children from harm with minimal (and tolerable) infringement on speech. It brings within the prohibition of child pornography not only images of actual children but also computer-generated, virtual images "that appear to be" children. 18 U.S.C. §§ 2252A, 2256(8)(B). The words "appear to be" apply to images "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. § 2251, Historical and Statutory Notes, Congressional Findings ¶ (5) ("Congressional Findings"). "Sexually explicit conduct" is defined as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A) through (E). Society's interest in material depicting children engaging in sexually-explicit activity is exceedingly low, and is surely outweighed by the compelling interest of the Federal government in protecting the health and welfare of children and facilitating law enforcement. The CPPA furthers those compelling interests in a manner fully in accord with First Amendment principles and should be upheld.

Congress considered extensive testimony and written materials in the course of its consideration of the CPPA. The Senate Judiciary Committee learned that, by use of cheap, readily-available software and scanners, photographs of actual children may be manipulated into sexually-explicit poses and

altered in such a manner that it is no longer possible to determine if the image is of an actual child. Sen. Rep. No. 104-358, IV.B (1996). It learned that child molesters or abusers use child pornography to seduce children into engaging in sexual activity. *Id.* Significantly, it also learned that virtual pictures present the same danger as actual pictures to children who are shown such material in an attempt to seduce them. *Id.*

Pictures are very powerful tools, especially when shown to children. The Senate Judiciary Committee cited a report by Dr. Shirley O'Brien, a psychologist, which indicated that a pedophile generally shows child pornography to his or her victim to educate the child and convince him or her that sexual conduct is acceptable. *Id.* at IV.A. The child, viewing the photograph, learns that other children engage in sexual activity, is desensitized, and lowers his or her inhibitions. *Id.* The child is then more likely to engage in sexual activity. *Id.* Dr. Victor Cline, a clinical psychologist specializing in the treatment of sexual compulsions and addictions, confirmed in his testimony before the Senate Judiciary Committee that pedophiles use child pornography to seduce children and persuade them to engage in sexual acts. *Id.* at IV.B.

The Attorney General's Commission on Pornography also noted this frequent use of child pornography. "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (footnotes omitted).

Congress was convinced, and found that the image of a child engaging in sexually-explicit activity, shown to the potential child victim, has the effect of breaking down the child's inhibitions so that he or she may believe that such

"fun" activity is performed by other children. Congressional Findings ¶ (3). Significantly, Congress also found that

> the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct.

Congressional Findings ¶ (9).

Further, the new technology for generating virtual child pornography poses insurmountable challenges to law enforcement. Virtual child pornography frequently is indistinguishable from actual child pornography. Congress acknowledged that law enforcement will have difficulty proving that a pornographic image portrays an actual child. Sen. Rep. No. 104-358, IV.A and B. Experts, as well as juries, may find it impossible to determine whether an image is of an actual child or a computer-generated, virtual child. Government would have to locate and produce for the jury an actual child depicted in the photo, a Herculean task that surely would cause further psychological harm to the child. *See id.* at IV.B. These difficulties will only become greater with time, as newer and better versions of the desktop imaging software and scanners become available to child pornographers.

Congress heard testimony to this effect. *See*, *e.g.*, *id.* (the new computer technology provides defendants with "a built-in reasonable doubt standard in every child exploitation/pornography prosecution"). Congress noted that, without a ban on virtual child pornography, "[s]tatutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and

pedophiles who possess pornographic depictions of actual children [would] go free from punishment." *Id.*

Congress also sought to encourage persons who possess child pornography to destroy it. *Id.* Since virtual child pornography is indistinguishable from actual child pornography, a person possessing such materials may retain both types, in the absence of any certainty that the pornographic image is entirely computer-generated. *Id.* Congress found that the prohibition on both types of child pornography "will encourage the possessors of such material to . . . destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children." Congressional Findings ¶ (12).

In addition, Congress heard testimony that child pornography whets the appetites of child molesters and abusers, and that virtual child pornography has the same effect in this regard as actual child pornography. Sen. Rep. No. 104-358, IV.A and B. Dr. Cline testified that child pornography "can act as an incitement to imitate it in real life with someone they have access to and can intimidate not to tell." *Id.* at IV.A. According to Dr. Cline, this sexual deviation is a learned behavior; child molesters and abusers use child pornography "to stimulate and whet their sexual appetites which they masturbate to [and] then use later as a model for their own sexual acting out with children." *Id.* The Senate Judiciary Committee also heard testimony that child pornography is "an addiction that escalates, requiring more graphic or violent material for arousal . . . ." *Id.*

Moreover, Congress noted that child pornography, whether actual or virtual, degrades children in general. It found that the depiction of children engaged in sexually-explicit activity "has a deleterious effect on all children by encouraging a societal perception of children as sexual objects

and leading to further sexual abuse and exploitation of them." Congressional Findings ¶ (11)(A).

Congress, hence, made five findings in support of its prohibition on virtual child pornography, each supported by testimony and relevant materials reviewed in the course of its consideration of the CPPA. *See, generally*, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996 -- A Reply to Professor Burke and Other Critics*, 35 Harv. J. on Legis. 245 (1998).

These congressional findings were supported by substantial evidence and are entitled to deference.

> Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting System, Inc. v. F.C.C., *supra*, 520 U.S. at 196. Congress has the responsibility to exercise the legislative power and a Court's obligation, in reviewing legislation, is simply to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). Congress, having the inherent flexibility to hear testimony and review writings on policy issues, is "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon [legislative questions]." *Id.* at 665. Indeed, when regulating child pornography, Congress and state legislatures have "greater leeway" than in other areas touching speech. *New*

York v. Ferber, 458 U.S. 747, 756 (1982). The *amici* States urge the Court to acknowledge Congress' "greater leeway" in its carefully-considered efforts to address the harm caused by child pornography.

In the CPPA, Congress made "predictive judgments" concerning harm to be avoided and remedial measures necessary to achieve its goal. One such judgment is that child pornography, actual or virtual, is used by child molesters and child abusers to seduce children into performing sexual acts. Another judgment is that law enforcement would be unable to effectively prosecute possessors of "actual" child pornography if they have a defense by labeling it "virtual." Both of these judgments closely relate to the harm to children that is to be avoided and to the remedial measure necessary to achieve that end, which is to deny child molesters and abusers a tool used in seduction and to facilitate law enforcement.

Indeed, as noted above, Congress is not the only legislature that has made the predictive judgment that child pornography, whether depicting actual or virtual children, is likely to cause harm to children. Eleven States have also found it necessary to pass laws banning computer-generated, virtual child pornography in order to protect its children. One State has such a bill pending. Eight States have laws banning sexually-explicit "depictions" of children. Each of these States seeks to protect its children from harm in a minimally-intrusive and tailored manner.

The Ninth Circuit found, however, that there is no evidence of harm to actual children from virtual pictures of children engaging in sexually-explicit activity, and so it held that Congress was without power to restrict this speech. *Free Speech Coalition v. Reno*, *supra*, 198 F.3d at 1093. In so finding, the Ninth Circuit failed to accord the predictive judgments of Congress due deference. Congress, after hearing testimony and reviewing relevant materials, found that there is a link between child pornography depicting a

virtual child, that is indistinguishable from a depiction of an actual child, and harm to children. Congressional Findings ¶¶ (3) and (9). The Ninth Circuit, however, re-weighed the material and found to the contrary, substituting its own review of available literature for that of Congress. This was inappropriate.

The First Circuit, in *United States v. Hilton*, 167 F.3d 61, *reh. en banc den.* (1st Cir.), *cert. den.*, 528 U.S. 844 (1999), the Eleventh Circuit, in *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), and the Fourth Circuit, in *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000), *pet. for cert. pending* (January 21, 2001), have each rightfully concluded that Congress is permitted to ban child pornography, whether actual or virtual, because of the low value of the speech and the great harm to children when such images are used as a tool of seduction. Those Courts of Appeals accorded Congress due deference, balanced the interests appropriately, and correctly found that the CPPA accords with First Amendment principles.

As the First, Fourth, and Eleventh Circuits found, the level of protection afforded by the First Amendment to virtual images of children engaging in sexually-explicit activity such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area," is exceedingly low. Naturally, not all speech is entitled to the same level of protection. *See, e.g., Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976) (society's interest in protecting non-obscene, sexually-explicit materials (portraying adults) is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). Hence, some utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussing lewd and obscene speech).

Indeed, this Court has placed child pornography in the category of less-protected, if not entirely unprotected, speech. *New York v. Ferber*, *supra*, 458 U.S. at 764; *Osborne v. Ohio*, 495 U.S. 103 (1990). The Court in *Ferber* considered a New York statute that prohibited the use of actual children in sexually-explicit performances. It held that child pornography "bears so heavily and pervasively on the welfare of children engaged in its production" that "the balance of competing interests is clearly struck and [] it is permissible to consider these materials as without the protection of the First Amendment." *Ferber*, *supra*, 458 U.S. at 764.

The Court expanded on this, finding in *Osborne*, *supra*, that "encouraging the destruction of these materials is [] desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." 495 U.S. at 111. Hence, protection of actual children depicted in pornographic images is not the only interest that can be considered compelling enough to restrict this type of speech. It is entirely appropriate for Congress to consider harm to all children who are at risk, including those at risk of seduction, and to fashion a remedy to address this harm.

The interest in protecting children from seduction surely is compelling enough to outweigh the minimal societal interest in speech that depicts children engaging in sexually-explicit activity such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area." *See Ferber*, *supra*, 458 U.S. at 757-58 (government's interest in "safeguarding the physical and psychological well-being of a minor" is not only compelling, but "constitutes a government objective of surpassing importance"). In addition, the interest in facilitating law enforcement, so that purveyors of actual child pornography, the creation of which abuses children, cannot readily evade prosecution, is similarly compelling.

Accordingly, while the CPPA, like the similar statutes enacted by the States, is content-based, in that it bans the possession of material based on its content and on its effect on viewers (both adult and child), the CPPA, like its State counterparts, survives strict scrutiny review. This Court has not hesitated to find that the destruction of material showing a child engaging in sexually-explicit activity is a compelling governmental purpose, to protect the actual children depicted and also to protect children who may be shown such pictures by child abusers or molesters. *Osborne*, *supra*, 495 U.S. at 111. Virtual child pornography is indistinguishable from actual child pornography and is used by child abusers and molesters to perpetuate their abuse of children in the same manner as depictions of actual children. Thus, the compelling interest in promoting the destruction of child pornography recognized in *Osborne* is present here. Moreover, actual child pornography has no First Amendment protection. *See Ferber*, *supra*, 458 U.S. at 764. Virtual child pornography warrants the same level of protection as actual child pornography. Surely the balance weighs in favor of the governmental interest in this case.

Eleven States, in addition to Congress, have come to the measured conclusion that the abolition of both actual and virtual child pornography, depicting children engaging in sexually-explicit activity, is necessary to protect children from unfathomable psychological and physical harm and to facilitate law enforcement. Both the Federal government and the States would be unable to enforce their bans on child pornography if they are required to establish that the image is actual, not virtual. Society's interest in material depicting children engaging in sexually-explicit activity is exceedingly low, and is easily outweighed by the compelling governmental interest in protecting the health and welfare of children and facilitating law enforcement. The CPPA furthers those compelling interests in a manner fully in accord with First Amendment principles and should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed and the Child Pornography Prevention Act of 1996 should be upheld as fully in accord with First Amendment principles.

Respectfully submitted,

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